## EX PARTE OR LATE FILED



March 29, 2000

Honorable William E. Kennard Chairman Federal Communications Commission 445 12th Street, S.W. Washington, D.C. 20554

Re: CC Docket No. 96-45, DA 99-1356
Western Wireless Corporation Petition for Preemption of an Order of the South Dakota Public Utilities Commission

Dear Chairman Kennard:

I would like to stress the urgent nature of Western Wireless Corporation's pending Petition for Preemption of the South Dakota Public Utilities Commission's ("SD PUC") order denying the Company's application for designation as an eligible telecommunications carrier ("ETC") in South Dakota. Western Wireless has been on the forefront of furthering the twin goals of the Telecommunications Act of 1996 ("Act") – competition and advancing and preserving universal service – but has experienced certain barriers to its efforts to introduce a competitive universal service offering in rural America. Western Wireless strongly believes that the basis for the SD PUC's denial of ETC status to Western Wireless warrants, and in fact requires, Commission preemption.

In a significant development late last week, the Sixth Judicial Circuit Court in South Dakota overturned the SD PUC's decision denying ETC status to Western Wireless. The state court properly concluded that the SD PUC erred in its finding that a carrier must already be providing universal service ubiquitously throughout its service area before receiving ETC designation, and remanded the case back to the SD PUC. While the state court decision is helpful, Commission preemption remains critically important to resolve the larger issues raised by the SD PUC decision.

First, FCC guidance is critical not only for the SD PUC but for the many other state commissions who are being presented with similar issues and who need FCC guidance as to the national policy for implementing the Act. As you may be

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aware, Western Wireless has applied for ETC designation in numerous states, has applications for ETC designation pending before the state commissions in Kansas. Nebraska, New Mexico, North Dakota, Oklahoma, Texas, and Utah, and plans to file applications in several other states over the next few months. 1/Other carriers have pending ETC applications, or are considering whether to file them and will make decisions in large part based on how the FCC handles this matter. The issues raised by the SD PUC's order are not unique to that state, but are present everywhere that Western Wireless and other carriers face contested proceedings regarding ETC designation. 2/A Commission decision would do much to lay the groundwork for future FCC decisions, as well as to provide the clarity and guidance for which many state commissions are apparently still waiting.

In addition, the court's order is not yet final, and may yet be appealed to the South Dakota Supreme Court. Moreover, the SD PUC may try to exploit additional opportunities for delay and for thwarting Western Wireless' ETC aspirations in addressing the issues that the court remanded to it. 3/ Given that Western Wireless applied for ETC status in South Dakota over a year and a half ago, the Commission should issue an order definitively resolving the issues that

<sup>1/</sup> Western Wireless also has applications pending before the FCC for Wyoming (where the state commission held it lacked jurisdiction to consider Western Wireless' application) and on the Crow reservation in Montana.

<sup>2/</sup> A good example of this may be found in the recommendation of an Oklahoma administrative law judge ("ALJ"), which has recommended that Western Wireless' ETC application be denied for the same reason that the SD PUC denied its ETC application. In essentially every ETC proceeding, the incumbent local exchange carriers have submitted the SD PUC decision as a model for ruling on Western Wireless' pending ETC applications. Commission preemption of the SD PUC decision is therefore necessary to implement the Act's statutory commands and establish clear national policy on universal service.

<sup>3/</sup> For example, the court's order directs the SD PUC to determine whether the public interest would be served by designating Western Wireless as an additional ETC in the rural telephone company service areas within the state, a matter as to which the FCC has thus far provided little guidance. The Commission should therefore take this opportunity to provide such guidance on how state commissions must make this critical determination. Specifically, the public interest inquiry for additional ETCs in rural telephone company service areas should focus on the consumer, with the issue being *not* the impact on the rural telephone company or competitive carrier, but rather whether the designation of an additional ETC is in the best interests of the rural consumers.

have already caused significant delay to the advent of competitive universal service in South Dakota. Such a decision would also likely be quite useful to the state Supreme Court should it be called upon to take up this matter.

Finally, it is clearly within the Commission's power to provide the requested guidance, notwithstanding the state court decision. As an administrative agency, the FCC is not bound by the "case or controversy" requirements that restrict Article III courts. 4/ To the contrary, both the Administrative Procedure Act and the Commission's rules empower the agency to "remove uncertainty" regarding matters within the agency's jurisdiction. 5/ As the Commission noted:

As an administrative agency, we are vested by statute with broad and discretionary powers to devise and use procedures, such as the issuance of declaratory judgments, as may be reasonably appropriate to discharge our statutory responsibilities with respect to effective regulation of interstate and foreign communication[.] <u>6</u>/

This power clearly exists in the context of the Commission's preemption authority under Section 253 of the Act. As the Commission held in *Silver Star Telephone Company, Inc.*, 7/"[w]e may preempt under Section 253(d) [even] in the absence of a directly aggrieved party or even a petition seeking preemption. \* \* \* \* Thus we have discretion to [take action] to terminate [] controversy and remove uncertainty." 8/ Notably, even in Section 253 preemption cases where the Commission has opted not to issue a ruling to provide guidance or remove

<sup>4/</sup> Telerent Leasing Corp., 45 FCC.2d 204, ¶ 21 (1974), aff'd sub nom., North Carolina Utilities Comm'n v. FCC, 537 F.2d 787, 790.

<sup>&</sup>lt;u>5</u>/ 5 U.S.C. § 554(e); 47 C.F.R. § 1.2.

<sup>6/</sup> Telerent Leasing Corp., 45 FCC.2d at ¶ 21.

<sup>7/ 13</sup> FCC Rcd 16356 (1998).

<sup>8/</sup> Id. at ¶ 23 (citing, inter alia, Telerent, 45 FCC.2d 204; Metropolitan Council of NAACP Branches v. FCC, 46 F.3d 1154, 1161 (D.C. Cir. 1995) (holding that Article III limitations on federal judicial power are inapplicable to administrative agencies); Gardner v. FCC, 530 F.2d 1086, 1090 (D.C. Cir. 1976) ("The agencies' responsibility for implementation of statutory purposes justifies a wider discretion, in determining what actions to entertain, than is allowed to the courts by either the Constitution or the common law") (other citations omitted).

uncertainty, it has indicated that it was declining to act as a matter of discretion, not because it was barred from acting. 9/

The Commission has long recognized a firm statutory basis for its exercise of this discretionary power:

Unlike federal courts, we are not restricted to adjudications of matters that are 'cases and controversies' within the meaning of Article III of the Constitution. Rather, Section 5(e) of the Administrative Procedure Act, 5 U.S.C. § 554(e) . . . authorizes agencies to issue declaratory orders with the sole objective of removing uncertainty. 10/

In so doing, the Commission noted that "it is particularly appropriate to take action . . . in order to remove or alleviate [] uncertainty and confusion," and that "[w]e would be remiss in the discharge of our statutory responsibilities were we to remain passive in the face of [] policy and regulatory uncertainties." 11/ Significantly, in the *Graphnet* case, the Commission acted because it was faced with "sharply differing views" on the issues presented. 12/ As the record in the Western Wireless South Dakota preemption proceeding makes clear, as do those in the Wyoming and Crow proceedings, the Commission is also confronted with "sharply differing views" on the application of Section 214(e). 13/ Hopefully, the FCC's decision in the instant proceeding, informed by the South Dakota appellate court's correct decision, will serve as a starting point for further clarification and guidance regarding the application of Section 214(e).

<sup>9</sup>/ See, e.g., TCI Cablevision of Oakland Co., Inc., 12 FCC Rcd 21396, ¶¶ 99, 101-02 (1997) (declining, "in our discretion," to decide the validity of, or address challenges to, specific sections of a local ordinance under Section 253 (but nevertheless "tak[ing] this opportunity to address generally some issues related to Section 253")).

<sup>10/</sup> Request for Declaratory Ruling and Investigation by Graphnet Systems, Incorporated Concerning a Proposed Offering of Electronic Computer Originated Mail, 73 FCC.2d 283, ¶ 11 (1979) ("Graphnet") (emphasis added).

<sup>&</sup>lt;u>11</u>/ *Id*.

<sup>12/</sup> Id. at ¶ 12.

<sup>13/</sup> See supra note 2.

As we have noted previously, the SD PUC must not be permitted to impede entry by competitive carriers, or to frustrate the advancement of the 1996 Act's universal service goals by applying unsupported and inappropriate standards in designating ETCs for participation in the federal universal service program. The Commission should act expeditiously and issue a ruling that can be read hand-in-hand with the South Dakota court's decision to provide guidance on the application of Section 214(e), both for the SD PUC on remand as it considers Western Wireless' ETC petition, and for other states faced with similar petitions from Western Wireless and other new entrants.

Respectfully submitted,

Gene DeJordy

Vice President, Regulatory Affairs Western Wireless Corporation

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#### **Enclosures**

cc: Honorable Susan Ness, Commissioner

Honorable Harold W. Furchgott-Roth, Commissioner

Honorable Michael K. Powell, Commissioner Honorable Gloria Tristani, Commissioner

Lawrence Strickling, Chief, Common Carrier Bureau

STATE OF SOUTH DAKOTA	) : SS		IN CIRCUIT COURT
COUNTY OF HUGHES	)		SIXTH JUDICIAL CIRCUIT
IN THE MATTER OF		)	Civ. 99-235
THE FILING BY GCC LICENSE CORPORATION FOR DESIGNATAS AN ELIGIBLE TELECOMMU		)	NOTICE OF ENTRY OF FINDINGS OF FACT, CONCLUSIONS OF LAW,
TIONS CARRIER		)	AND ORDER

## TO ALL INTERESTED PARTIES AND THEIR RESPECTIVE COUNSEL OF RECORD::

Please take notice that Findings of Fact, Conclusions of Law, and Order, a true copy of which is appended hereto, has been entered by the above-named Court on March 22, 2000 and filed with the Clerk of Courts, Sixth Judicial Circuit, Hughes County, on March 22, 2000.

Dated: March 24, 2000

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- and -

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By

Steven W. Sanford

ATTORNEYS FOR GCC LICENSE CORPORATION

### CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true and correct copy of the foregoing Notice of Entry of Findings of Fact, Conclusions of Law, and Order was mailed to the following at their respective addresses of record:

Mr. Cameron Hoseck
Executive Director
Public Utilities Commission
State of South Dakota
500 East Capitol
Pierre, SD 57501

Mr. William P. Heaston Dakota Telecommunications Group P.O. Box 66 29705 453<sup>rd</sup> Avenue Irene, SD 57037-0066

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by U.S. mail, postage prepaid, on March 24, 2000.

Steven W. Sanford

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
COUNTY OF HUGHES	) ss. )	SIXTH JUDICIAL CIRCUIT
THE FILING BY GCC LICEN CORPORATION FOR DESIGNATION AN ELIGIBLE TELECOMMUNICA-		Civ. 99-235
TIONS CARRIER	Ś	•

# APPELLATE'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On August 25, 1998, the South Dakota Public Utilities Commission ("Commission") received an Application from GCC License Corporation ("GCC") requesting designation as an eligible telecommunications carrier ("ETC") pursuant to Section 214(e) of the Telecommunications Act of 1996, 47 U.S.C. § 151 et seq. (the "Act") for all the exchanges contained within all of the counties in South Dakota.

On August 26, 1998, the Commission electronically transmitted notice of the filing and the intervention deadline of September 11, 1998, to interested individuals and entities. At its September 23, 1998, meeting, the Commission granted intervention to Dakota Telecommunications Group, Inc. ("DTG"), South Dakota Independent Telephone Coalition ("SDITC"), and U S WEST Communications, Inc. ("US WEST").

The Commission set the hearing for December 17 and 18, 1998, starting at 9:00 A.M., on December 17, 1998, in Room 412, State Capitol, Pierre, South Dakota. The issue at the

hearing was whether GCC should be granted designation as an eligible telecommunications carrier for all the exchanges contained within all of the counties in South Dakota.

Following the submission of post-hearing briefs from the parties, the Commission denied GCC's Application pursuant to Findings of Fact, Conclusions of Law and Order dated May 19, 1999 ("Order").

GCC timely filed its Notice of Appeal on June 3, 1999, seeking review of the Commission's Order. Having considered GCC's Appeal, the Court makes the following Findings of Fact, Conclusions of Law and Order pursuant to SDCL 1-26-36:

## **FINDINGS OF FACT**

- I. On August 25, 1998, GCC filed an application requesting designation as an ETC for all of the counties within South Dakota. (Order, p. 1, ¶ 1.) GCC currently provides mobile cellular service in South Dakota under the trade name "Cellular One." (Order, p. 1, ¶ 1.) GCC is a wholly-owned subsidiary of Western Wireless Corporation ("Western Wireless".) (Order, p. 1, ¶ 1.)
- 2. Pursuant to 47 U.S.C. § 214(e)(2), the Commission is required to designate a common carrier that meets the requirements of Section 214(e)(1) as an ETC for a service area designated by the Commission. (Order, p. 1, ¶ 2.) However, before designating an additional ETC for an area served by a rural telephone company, the Commission must also find that the designation is in the public interest. 47 U.S.C. § 214(e)(2). (Order, p. 2, ¶ 2.) GCC requested designation as an additional ETC throughout the state, which includes areas

served by rural telephone companies and areas served by non-rural telephone companies.

(Order, p. 2, ¶ 2.)

- 3. Pursuant to 47 U.S.C. § 214(e)(1), a common carrier that is designated as an ETC is eligible to receive universal service support and shall, throughout its service area, offer the services that are supported by federal universal service support mechanisms either using its own facilities or a combination of its own facilities and resale of another carrier's services. The carrier must also advertise the availability of such services and the rates for the services using media of general distribution. (Order, p. 2, ¶ 3.)
- 4. The undisputed record evidence demonstrates that GCC is a common carrier.

  (No. 11, p. 6.)
- 5. The Federal Communications Commission ("FCC") has designated the following services or functionalities as those supported by federal universal service support mechanisms: (1) voice grade access to the public switched network; (2) local usage; (3) dual tone multifrequency signaling or its functional equivalent; (4) single party service or its functional equivalent; (5) access to emergency services; (6) access to operator services; (7) access to interexchange service; (8) access to directory assistance; and (9) toll limitation for qualifying low-income consumers. 47 C.F.R. § 54.101(a). (Order, p. 2, ¶ 4.)
- 6. As part of its obligations as an ETC, an ETC is required to make available Lifeline and Link-Up services to qualifying low-income consumers. 47 C.F.R. § 54.405; 47 C.F.R. § 54.441. (Order, p. 2, ¶ 5.)

- through its existing mobile cellular services. The Commission's Order questioned only GCC's provision of the second supported service, local usage. (Order, p. 3, ¶ 12.) GCC's current mobile cellular packages provide users an amount of local usage, at no extra charge, which can be used to either originate outgoing calls or terminate incoming calls. See 47 C.F.R. § 54.101(a)(2). In addition, GCC presented undisputed testimony that it will provide unlimited local usage as part of a universal service offering once designated as ETC, and will comply with any minimum local usage requirements adopted by the FCC in the future. (No. 10, p. 9; No. 23, p. 56.) GCC thus currently provides local usage as defined by the FCC, and will continue to provide local usage consistent with the FCC's requirements in its universal service offerings.
- 8. GCC testified that it currently provides mobile cellular service using various types of customer handsets (e.g., small handheld pocket phones, larger briefcase-sized phones, and car phones). GCC also explained it believes that its universal service customers will likely want a wireless local loop service that has certain attributes of traditional landling technology. (No. 11, p. 8; No. 23, p. 115.) For example, GCC explained that customers will likely want dial-tone and the ability to connect answering machines, fax machines, and other peripheral devices, which are features unavailable with a traditional cellular mobile handset. Yet, these features are available using wireless local loop customer premises equipment. (No. 23, pp. 115-16.) GCC also explained that the wireless local loop equipment provides

better signal strength than conventional handsets, so the clarity of calls is enhanced. (No. 10, p. 12.)

- Based upon the consumer benefits of wireless local loop technology, GCC .9. proposed to provide its universal service offerings using wireless local loop technology and a wireless access unit provided by GCC to customers. (No. 23, p. 115.) A wireless access unit is nothing more than a piece of customer premises equipment that offers features not available with a traditional cellular handset. For example, a wireless access unit has 3 watts of power as opposed to .5 watts typically available with a conventional for a cellular handset. The increased power of a wireless access unit allows for increased signal strength. (No. 23, p. 99.) The wireless access unit also simulates dial-tone, and allows customers to plug in fax machines, answering machines, or other peripheral devices just as they would with landline telephone service. (No. 23, pp. 115-16.) In addition, GCC can optimize signal strength by installing high gain antennas at the customer's residence, if necessary. (No. 23, p. 99.) Unlike a conventional mobile cellular application, where a signal may be subject to fading in and out based upon terrain, a wireless local loop access unit provides a strong, consistent signal. (No. 10, p. 12.)
- 10. The undisputed record evidence demonstrates that the provision of the supported services is the same whether the customer uses a wireless access unit or a conventional cellular handset. GCC's network infrastructure used to provide the services -- the antennae, cell sites, switch, trunk and radio frequency spectrum -- is the same. (No. 23,

- pp. 29, 124-25.) The nature of the services does not change simply because the customer equipment used to transmit and receive the services (i.e., cellular handset vs. wireless access unit) is different. GCC's network infrastructure does not distinguish between calls originated or terminated using a cellular handset or a wireless local loop access unit. (No. 23, p. 29.)
- 11. GCC is licensed to provide cellular service throughout the State, and has existing signal coverage in 98% of the geography of the State. (No. 10, p. 3; No. 23, p. 30; No. 21.)
- 12. GCC can offer universal service throughout the State immediately upon designation, and can provide universal service to all who request it.
- 13. Thus, GCC currently provides the FCC's supported services and demonstrated the intent and ability to provide a universal service offering throughout the state once designated an ETC.
- 14. The undisputed record evidence demonstrates that GCC can and will comply with the requirements to advertise its universal service offerings as required under 47 U.S.C. § 214(e) and to participate in the federal Lifeline and Link-up programs. (No. 23, p. 10.)
- 15. Because the Commission did not reach the issue of "public interest in areas served by rural telephone companies," this Court does not reach that issue on this Appeal.

## **CONCLUSIONS OF LAW**

1. This Court has jurisdiction over this appeal matter pursuant to SDCL 1-26-30.2.

- 2. This Court's review of the Commission's Order is governed by SDCL 1-26-36.

  On review from an agency's determination, this Court will reverse or modify the agency's decision if the findings, conclusions or decisions are:
  - (1) In violation of constitutional or statutory provisions;
  - (2) In excess of the statutory authority of the agency;
  - (3) Made upon unlawful procedure;
  - (4) Affected by other error of law;
  - (5) Clearly erroneous in light of the entire evidence in the record; or
  - (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

### SDCL 1-26-36.

- 3. This Court will review questions of law on a <u>de novo</u> basis, giving no deference to the Commission's decision. <u>Caldwell v. John Morrell Co.</u>, 489 N.W.2d 353, 357 (S.D. 1992). Where an error of law affects a finding of fact, that finding is reviewed <u>de novo</u> as well. <u>In re Balhorn-Moyle Petroleum Co.</u>, 315 N.W.2d 481, 483 (S.D. 1982). Mixed questions of fact and law are thus reviewed <u>de novo</u> as questions of law. <u>In re Hendrickson's Health Care Service</u>, 462 N.W.2d 655, 656 (S.D. 1990).
- 4. Where an appellant challenges a pure finding of fact, it must demonstrate the finding is clearly erroneous in light of the entire evidence in the record. SDCL 1-26-36(5). The Court must set aside the fact finding if, after considering the evidence as a whole, the Court is convinced a mistake has been made. Sopko v. C&R Transfer Co., 575 N.W.2d 225 (S.D. 1998). If this Court does not affirm the Commission's findings and conclusions, it

must enter its own findings and conclusions and remand for further proceedings, if required.

SDCL 1-26-36; Schroeder v. Department of Soc. Servs., 529 N.W.2d 589, 592 (S.D. 1995).

- 5. Any Finding of Fact made above which is more appropriately a Conclusion of Law shall be considered a Conclusion of Law.
- 6. Pursuant to 47 U.S.C. § 214(e)(2), the Commission is required to designate a common carrier that meets the requirements of Section 214(e)(1) as an ETC for a service area designated by the Commission. However, before designating an additional ETC for an area served by a rural telephone company, the Commission must find that the designation is in the public interest. 47 U.S.C. § 214(e)(2). (Order, p. 6, ¶ 2.)
- 7. Pursuant to 47 U.S.C.  $\S 214(e)(1)$ , a common carrier that is designated as an ETC is eligible to receive universal service support and shall, throughout its service area, offer the services that are supported by federal universal service support mechanisms either using its own facilities or a combination of its own facilities and resale of another carrier's services. The carrier must also advertise the availability of such services and the rates for the services using media of general distribution. (Order, p. 6,  $\P 3$ .)
- 8. The FCC has designated the following services or functionalities as those supported by federal universal service support mechanisms: (1) voice grade access to the public switched network; (2) local usage; (3) dual tone multi-frequency signaling or its functional equivalent; (4) single party service or its functional equivalent; (5) access to emergency services; (6) access to operator services; (7) access to interexchange service; (8)

access to directory assistance; and (9) toll limitation for qualifying low-income consumers.

47 C.F.R. § 54.101(a). (Order, p. 6, ¶ 4.)

- 9. As part of its obligations, an ETC is required to make available Lifeline and Link-Up services to qualifying low-income consumers. 47 C.F.R. § 54.405; 47 C.F.R. § 54.411. (Order, p. 6, ¶ 5.)
- applicant is capable of meeting its obligation to offer and advertise a universal service offering throughout its requested designated service area once designated an ETC. The Commission erred as a matter of law by determining that an applicant for ETC designation must first be providing a universal service offering to every location in the requested designated service area prior to being designated an ETC.
- 11. Because the Commission erroneously applied the law, this Court must determine de novo based on the record evidence whether GCC meets the proper legal standard. As is set forth in the above Findings of Fact, GCC has demonstrated an intent and ability to offer and advertise a universal service offering throughout its requested designated service areas once designated an ETC in accordance with the requirements of 47 U.S.C. § 214(e) and the FCC's rules and orders.
- 12. It would be unfair and discriminatory to require an ETC applicant to serve every location in a requested designated service area as a prerequisite to ETC designation.

  Incumbent local exchange carriers, who are also ETCs, are continually building new

facilities to respond to requests to extend service to unserved consumers. (No. 23, p. 165.)

GCC meets the service area requirement because its license and coverage area support its commitments to offer universal service throughout the State and to provide universal service to all who request it.

- 13. For areas served by non-rural telephone companies, GCC meets all applicable criteria for ETC designation and is entitled to be designated an ETC under 47 U.S.C. § 214(e).
- 14. For areas served by rural telephone companies, GCC meets all applicable criteria for ETC designation except the public interest factor, which was not reached by the Commission and not addressed herein. GCC is entitled to be designated an ETC in these areas served by rural telephone companies so long as the Commission determines that designation is in the public interest under 47 U.S.C. § 214(e)(2).

### **ORDER**

- 1. The Commission's Findings of Fact, Conclusions of Law, and Order dated May 19, 1999, are replaced by this Court's Findings of Fact, Conclusions of Law, and Order, which shall be entered as provided by SDCL 1-26-36.
  - 2. This matter is remanded to the Commission for further proceedings as follows:
  - (a) The Commission shall enter an Order designating GCC an ETC in each South

    Dakota exchange served by a non-rural telephone company; and

- (b) The Commission shall, based on the record, determine whether designation of GCC as an additional ETC in areas served by rural telephone companies is in the public interest as contemplated by 47 U.S.C. § 214(e)(2).
- (c) The Commission shall designate GCC an ETC in each rural telephone company study area where the additional designation is in the public interest.

Dated: 3-27-2000

JUNGE OF CIRCUIT COURT

This document supersedes
The Eindrugs Canclusions of
Order dated 3-20-2000

STATE OF SCUIM D'AKOTA CIRCUIT COURT, HUGHES CO. FILED

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